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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CUBBY FRENCH,

Plaintiff and Appellant,

v.

CAN-AM CONSTRUCTION COMPANY,  
INC., et al.,

Defendants and Respondents.

B152713

(Los Angeles County  
Super. Ct. No. BC190051)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Mary Ann Murphy, Judge. Dismissed.

Cubby French, in pro. per., for Plaintiff and Appellant.

Rockard J. Delgadillo, City Attorney, Richard M. Helgeson, Senior  
Assistant City Attorney, and Lisa S. Berger, Deputy City Attorney, for Defendant and  
Respondent City of Los Angeles.

Chapman, Glucksman & Dean for Defendant and Respondent Can-Am  
Construction Company, Inc.

Friedenthal, Cox & Herskovitz for Defendant and Respondent Sawco Inc.  
dba California Boring.

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Cubby French appeals from the judgment entered upon an order of dismissal filed on September 8, 2000, as well as a May 21, 2001, order denying his motion to vacate the order of dismissal. We conclude French's appeal is untimely because he filed it more than 60 days after service of the notice of entry of judgment and after service notice of the order denying his motion to vacate. Moreover, French has not demonstrated he filed any valid post-judgment motion which would have extended the time for appeal. Accordingly, the appeal is dismissed.

### ***FACTUAL AND PROCEDURAL HISTORY***

On April 27, 1998, French filed a complaint against Can-Am Construction Company, Inc. ("Can-Am Construction") and the Department of Water and Power of the City of Los Angeles ("DWP") for negligence and premises liability. On June 13, 2000, French's counsel was relieved and a trial setting conference was scheduled for July 21, 2000. A notice of this ruling was served on French on June 14, 2000. In addition to the ruling, French received a copy of an "Appearance by Phone" brochure.

French did not appear at the trial setting conference on July 21, 2000. The court set the matter for an Order to Show Cause (OSC) regarding sanctions pursuant to Code of Civil Procedure section <sup>1</sup> 177.5 and an OSC regarding the striking of the complaint pursuant to section 575.2, both of which were to be heard on September 8, 2000. The court also ordered that French receive another copy of an "Appearance by Phone" brochure and the "Conference Call Service Request Form."

French did not appear at the OSC hearing on September 8, 2000. The court reviewed the prior notice of the hearing and the appearance information provided to French, and dismissed the complaint pursuant to section 575.2. On September 13, 2000, notice of the dismissal was served on French by certified mail.

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<sup>1</sup>

All statutory references are to the Code of Civil Procedure unless otherwise stated.

On January 24, 2001, the court received an undated letter from French. The court issued a minute order stating that the “court does not act on letters” and indicating that if French wanted the court to “reconsider any order, a motion shall be filed.” The order also indicated French had not sent copies of his letter to counsel for the other parties.

On April 19, 2001, French filed a notice of motion to vacate the order of dismissal. DWP and Can-Am Construction opposed the motion, contending that French’s motion was untimely because he failed to bring it within six months of the dismissal. DWP also argued French failed to establish mistake, inadvertence, surprise or excusable neglect.

French appeared via telephone for the hearing on the motion on May 21, 2001. The court found French filed the motion “beyond the six month mandatory time provided in Code of Civil Procedure § 473.” In addition, the court ruled French failed to appear on two different occasions for hearings despite the option of appearing telephonically and “failed to comply with basic notice procedures in the matter.” The motion to vacate was denied and French was served with notice of the ruling on May 22, 2001.

On June 14, 2001, French filed a motion to reconsider under section 1008. French argued that his motion to vacate was timely because he mailed notice of the motion to the court on February 13, 2001. Attached to the motion for reconsideration was a document titled “Legal Mail for P32296, FRENCH, CUBBY.” This document indicated something had been mailed to the court on February 13, 2001. The court scheduled the hearing on the motion for reconsideration on July 25, 2001.

French again appeared telephonically for the motion for reconsideration hearing on July 25, 2001. The court found the motion untimely as it was filed 24 days after the May 21, 2001, denial of his motion to vacate. Notice of the order denying the motion for reconsideration was served on French by certified mail on July 26, 2001.

On August 2, 2001, French filed his notice of appeal from the order denying his motion to vacate the order of dismissal. He also appealed from the September 8, 2000,

order of dismissal. This court dismissed French's appeal as untimely on October 26, 2001.<sup>2</sup> The appeal was reinstated on March 20, 2003.<sup>3</sup>

## ***DISCUSSION***

### **I. The Appeal From the Judgment After Dismissal is Untimely**

Under California Rules of Court (CRC), rule 2, unless time to appeal is extended under CRC rule 3, an appeal must be filed within 60 days after the date of mailing an appealable order or notice of entry of judgment. Here, the original order of dismissal was entered on September 8, 2000, and French was served with notice of the dismissal and entry of judgment by certified mail on September 13, 2000. Absent an extension of time to appeal under CRC rule 3, French had until November 12, 2000, to file his notice of appeal from the judgment.

Nothing French subsequently sent to the court served to extend the time allowed to appeal. If French had filed a valid motion to vacate within the 60 days (by Nov. 12, 2000) pursuant to CRC rule 3, then under CRC rule 2, the time to appeal would have been extended until 30 days after service of the order denying the motion to vacate.

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<sup>2</sup> Remittitur issued from this court on January 2, 2002. In December 2002, French filed a Petition for Writ of Habeas Corpus in the Superior Court, contending he was denied the right to file a timely motion to vacate the dismissal of his action. On December 19, 2002, Judge Murphy denied the writ, noting that the court file and register of action contained no motion from February 2001, and that motions must be filed and served on the other parties to be effective. Judge Murphy also held that the writ was defective because it was not served on opposing counsel.

<sup>3</sup> This court recalled the remittitur and vacated the order dismissing the appeal based on French's motion to recall the remittitur in which French argued that his appeal was timely because he had filed a *valid* motion for reconsideration of the order denying his motion to vacate the judgment.

French does not claim he filed a motion to vacate prior to November 12, 2000. Thus, CRC rule 3 does not apply to extend his time to appeal from the underlying judgment.

Nonetheless, French contends he filed a timely section 473 motion on February 13, 2001. He provided the court with a “print out” of “legal mail” sent from prison, which indicates that some unidentifiable mail was sent to the trial court on February 13, 2001. French argues that because he sent the motion before the six month period expired, and because he had no control over the motion once it left the prison, the motion must be considered valid. Notwithstanding French’s “print out,” he has not demonstrated the court received a motion to vacate, or that such a motion was actually filed. Moreover, French has not shown he served opposing parties with copies of the motion. Even if we considered the February 13, 2001, “print out,” it could not be considered a “valid” motion to vacate under CRC rule 3.<sup>4</sup>

Because French has not demonstrated he filed a valid section 473 motion, he is not entitled to any extension under CRC, rule 3, to file his appeal from the judgment. Moreover because he did not file his notice of appeal from the September 8, 2000, judgment until August 2, 2001, then his appeal is untimely under CRC rule 2 and must be dismissed.

## **II. The Appeal From the Order Denying the Motion to Vacate is Untimely**

Under CRC, rule 2, French was required to file a notice of appeal from the order denying his motion to vacate within 60 days of service of notice of the order denying the motion. French was served with such notice on May 22, 2001.

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<sup>4</sup> We note French did not file his motion to vacate the order of dismissal until April 19, 2001. Under section 473, to be valid, the application for relief must be made within a reasonable period of time and shall not exceed six months. (§ 473, subd. (b).) French’s motion to vacate was filed more than six months after the complaint was dismissed, thereby making the motion invalid.

Pursuant to CRC, rule 3, a timely motion for reconsideration can extend the time for filing a notice of appeal from the original ruling until 30 days after entry of the order denying reconsideration. (*Blue Mountain Development Co. v. Carville* (1982) 132 Cal.App.3d 1005, 1009-1010.) Under section 1008, a motion for reconsideration is timely if it is filed within ten days after service of the written notice of the entry of an order.<sup>5</sup> The section also requires a showing of new or different facts, circumstances or law. French's motion for reconsideration was not filed until June 14, 2001, which is 24 days after the court denied French's motion to vacate. French's motion for reconsideration is untimely.

Since French's motion for reconsideration is invalid, it does not extend the time he had to appeal. Given that the appeal was filed on August 2, 2001, and that French was served with the notice of the order denying his motion to vacate on May 22, 2001, the appeal was not filed within the required 60 days. Therefore, French's appeal of this order is untimely under CRC, rule 2, and must be dismissed.

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<sup>5</sup> Code of Civil Procedure section 1008 provides, in pertinent part:

“(a) When an application for an order has been made to a judge, or to a court, and refused in whole or in part, . . . any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. . . .”

***DISPOSITION***

The appeal is dismissed. Costs are awarded to respondents.

WOODS, J.

We concur:

PERLUSS, P.J.

JOHNSON, J.